ISKANDAR GAYO & ORS

v

DATUK JOSEPH PAIRIN KITINGAN & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN HASHIM J
[CIVIL SUIT NO: K22-78 OF 1995]
8 JULY 1996

ADMINISTRATIVE LAW: *Remedies – Public law and private law – Distinction – Breach of statutory duty – Whether breach gives rise to private law cause of action – Remedies available*

CIVIL PROCEDURE: *Striking out – Rules of the High Court 1980, O 18 r 19 – Grounds – Whether plaintiffs had locus standi*

EQUITY & TRUST: *Duties – Distinction between private trust and statutory obligations and duties – Whether breach of statutory duties enforceable in Courts – Whether possessor of statutory power for public purposes owes fiduciary duty to public*

WORDS & PHRASES: *"Trust in the higher sense" – "Trust in the lower sense"*

TORT: *Conspiracy – Conspiracy to injure – Principles and elements*

The plaintiffs, claiming themselves to be Malaysian-born and residing in Sabah and to be beneficiaries and/or persons having an interest in the Sabah Foundation ('the Trust'), sued the 1st and 2nd defendants for, *inter alia*, the alleged mismanagement of the Trust and breach of duty of care. The plaintiffs claimed that the 2nd defendant had wrongfully and maliciously conspired with the 3rd, 4th, and 5th defendants to defraud the Trust by entering into three agreements with the 3rd, 4th, and 5th defendants respectively whereby timber lands belonging to the Trust were sold to the said defendants at a price which was said to be grossly and exorbitantly below the prevailing market price at the material time.

In due course, the defendants filed an application under O 18 r 19(l)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') to strike out the plaintiffs' suit.

The two main issues that fell for determination were: (i) the nature of the Trust, and whether it was justiciable at the instance of the plaintiffs; and (ii) whether or not the 1st and 2nd defendants had committed a breach of statutory duty, and if so, whether or not it gave rise to any private law cause of action to the plaintiffs.

Held:

[1] A distinction must be drawn between trust-like governmental duties or obligations conferred by Parliament, and duties and obligations arising under private trusts. A trust of the former kind is often called a 'trust in the higher sense,' and it is not enforceable in and by the courts. Whereas, a trust of the latter type, often known as a 'trust in the lower sense' or a 'true trust' is enforceable by the Courts.

[2] The determination of whether an instrument has created a 'true trust' or a 'trust in the higher sense' is a matter of construction, looking at the whole of the instrument in question, its nature and effect, and its context, one material factor being whether the person required to hold on trust was described in his personal or in his official capacity.

[3] In the present case, from the surrounding circumstances and looking at the whole of the relevant provisions, and as a matter of construction, the Trust was a governmental obligation not restricted to any limited class of the public but for the public at large who are Malaysian citizens residing in Sabah and for the citizens of Sabah as a whole. Hence, as the nature of the Trust was such that it was not a 'true trust' but a 'trust in the higher sense,' it was, therefore, not justiciable at the instance of the plaintiffs.

[4] It is important to distinguish actions to recover damages based on a private law cause of action from actions in public law to enforce the due performance of statutory duties brought by way of judicial review. The breach of a statutory duty does not by itself give rise to any private law cause of action but such right might arise where on its true construction the statute imposes a duty for the protection of a limited class of the public and there is a clear parliamentary intention to confer a private right of action for breach on members of that class.

[5] With respect to the present suit, the Trust was not created for the protection of a limited class of the public. The duty imposed on the possessor of the statutory power for public purposes was not accurately described as fiduciary because there was no beneficiary in the equitable sense. Hence, it was not enforceable by private right of action by the plaintiffs who were not beneficiaries to the Trust.

[6] One of the elements of a cause of action in a conspiracy to injure is the need for the plaintiff to show an intention on the part of the defendant to injure the plaintiff. From the pleadings, it was clear that there was no averment that there was such an intention on the part of the defendants to injure the plaintiffs.

[Plaintiffs' suit dismissed with costs]

Cases referred to:

Alfred Kinloch v The Secretary of State for India in Council [1882] Vol. V HL (E) 619 ***(cit)***

Tito v Waddell (No.2) [I977] 1 Ch. 106 ***(foll)***

Fouche v State Superannuation Fund Board [1952] 88 CLR 609 ***(refd)***

Board of Trustees of the Sabah Foundation v Datuk Haji Kassim Othman ("The Writ'), SLA. Vol. IX [1990-1991] ***(refd)***

Superannuation Fund Investment Trust v Commissioner of Stamps (SA) [1979] 145 CLR 330 ***(cit)***

X (Minors) v Bedfordshire C.C [1995] 2 AC 633 ***(refd)***

M (A Minor) v Newham LBC [1995] 2 AC 633 ***(cit)***

Swain v Law Society (1983) 1 AC 598 ***(refd)***

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 SC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O 18, r 19(1)(a), (b), (d)

Sabah Foundation Enactment 1966, ss. 3, 4(1), (2)(a), (b), (c), (d), 5(1)(a), (b), (c), 11(1), (2), (3), 12(1)

Other sources referred to:

Law of Trust in Australia, Jacob, 5th Edn, [1986] para 274, p 54

Law Relating to Trusts and Trustees, Underhill and Hayton, 14th Edn

Halsbury's Laws of England, 4th Edn, (1995), Vol 48, para 514, p 258

For the plaintiffs - Colin S.H. Lau; M/s Colin Lau & Co

For the first defendant - Cecil Abraham (Martin Idang with her) M/s Martin Idang Rantau Allion Mahap & Co

For the second defendant - RTS Khoo (Martin Idang with him) M/s Martin Idang Rantau Allion Mahap & Co

For the third defendants - Roderic Fernandez; Shelley Yap Leong Tseu Chong Chia & Co

For the fourth defendants - Majnah Abdillah; M/s Chin Lau Wong & Foo

For the fifth defendants - Maijol Manap; M/s Martin Idang Rantau Allion Manap

JUDGMENT

Suleiman Hashim J:

These are defendants' applications, third and fourth defendants' and I think also first, second and fifth defendants' under O 18, r 19(1)(a), (b), (d) Rules of the High Court 1980 that the suits against them be dismissed with costs, first and second defendants' application dated 22 August 1995 the others dated 17 July 1995, 24 July 1995 and 10 January 1996.

Plaintiffs' statement of claim dated 18 May 1995 16 pages followed by the amended statement of claim dated 12 December 1995 18 pages, with respect, both somewhat circuitous and at times repetitive, briefly is that first defendant at all material times the Chief Minister of the State of Sabah and Chairman of the Board of Trustees, Sabah Foundation and second defendant at all

material times a director of the Foundation, executive chairman and/or the chief executive officer and/or a director of a company incorporated in Malaysia known as Innoprise Corporation Sdn Bhd ("Innoprise") and managing director and/or a director of Sapangar Sdn Bhd and Sabah Berjaya Sdn Bhd which are wholly-owned subsidiaries of the Foundation and Innoprise respectively, the foundation, the "trust" referred to by plaintiffs being the foundation established under s 3 and the Foundation fund being the fund established under s 4 of the Sabah Foundation Enactment, 1966, that first and second defendants had mismanaged the "trust", failed in their duty of care, breached their duty of care, are guilty of negligence or gross negligence, that second defendant had wrongfully and maliciously conspired with third, fourth and fifth defendants and combined to defraud and injure the "trust" more specifically by entering into three agreements,

(a) 4 July 1989, the trust by one of its wholly-owned subsidiaries Sapangar Sdn Bhd under the direction and/or consent and/or with the knowledge of innoprise entered into an agreement with the 3rd defendant whereby subject to the terms and conditions therein contained, the trust by its wholly-owned subsidiary Sapangar Sdn Bhd agreed to sell and/or sold all timber logs in an identified area measuring 60,727 hectares (more or less) of the Trust's Timber Lands to the 3rd defendant at a price of RM10.00 per cubic metre of log which said price was grossly and exorbitantly below the prevailing market price at that material time;

(b) 7 May 1990, Sabah Berjaya Sdn Bhd under the direction and/or consent and/or with the knowledge of Innoprise entered into an agreement with the 4th defendant whereby, subject to the terms and conditions therein contained, Sabah Berjaya Sdn Bhd agreed to sell and/or sold all timber logs in an identified area measuring 13,575 hectares (more or less) of the trust's Timber Lands to the 4th defendant at a price of RM10.00 per cubic metre of log which said price was grossly and exorbitantly below the prevailing market price at that material time; and

(c) 5 March 1994, Sapangar Sdn Bhd under the direction and/or consent and/or with the knowledge of the trust and/or of Innoprise entered into an agreement with the 5th defendant whereby, subject to terms and conditions therein contained, Sapangar Sdn Bhd agreed to sell and/or sold all timber logs in an identified area measuring 27,073 hectares (more or less) of the trust's Timber Lands to the 5th defendant at a price of RM4 per cubic metre of log which said price was grossly and exorbitantly below the prevailing market price at that material time.

Plaintiffs further averred that as a result of the three agreements the "Trust" "suffered loss and damage of up to a sum not more than RM2.955 billion", that "thereby the plaintiffs as beneficiaries and/or persons having an interest in the trust and/or the fund also suffered loss and damage", plaintiffs being "Malaysians and were born and reside in Sabah", and "have previously received dividends from the said 'Trust', that "the 3rd, 4th and 5th defendants are

companies incorporated in Malaysia and were, at all times material to this action, in the business of timber trading" and that third, fourth and fifth defendants had wrongfully and maliciously conspired with second defendant and combined to defraud and injure the "Trust" and Sapangar Sdn Bhd, Sabah Berjaya Sdn Bhd and Sapangar Sdn Bhd, as in the improprieties alleged in the agreements and plaintiffs claim declarations including that first' and second defendants as a result of their "negligence and gross negligence...breach or breaches of duty pay damages of up to RM2.995 billion to the Trust including the subsidiary company Sapangar Sdn Bhd and/or Innoprise and/or to the subsidiary company Sabah Berjaya Sdn Bhd arising from the said negligence and gross negligence and breach or breaches of duty or duties" and damages, costs, interest, against all defendants.

The applications came up for hearing before me on 15 April 1996 and,

(1) Counsels for first and second defendants tendered their joint written submission dated 15 April 1996 with list of authorities (2 volumes dated 12 April 1996 followed by oral submissions.

(2) Counsel for third defendants made an oral submission with list of authorities date 11 January 1996.

(3) Counsel for fourth defendants tendered a written submission dated 15 April 1996 with List of Authorities dated 28 November 1995 followed by oral submission.

(4) Counsel for fifth defendants made an oral submission with List of Authorities dated 12 April 1996.

(5) Counsel for plaintiffs tendered a written submission (undated) with List of Authorities 30 November 1995), Supplementary List of Authorities (dated 11 January 1996) and second Supplementary List of Authorities (undated) followed by oral submission.

After adjournment on 15 April 1996 hearing before me resumed on 14 May 1996 with the replies by counsels for defendants, with written reply dated 14 May 1996 and oral reply and three more authorities by counsels for first and second defendants, oral replies by counsels for third and fourth defendants and written reply dated 14 May 1996 and oral reply by counsel for fifth defendants.

At the outset I too had thought as submitted by Counsel for plaintiffs that there were only two main issues, (1) the nature of the "Trust", whether or not justiciable at the instance of plaintiffs and, (2) whether or not plaintiffs have *locus standi*. With respect, as in the point submission particularly by Counsels for first, second and the submission by Counsel for third defendants there is another main issue, whether or not first and second defendants have committed a breach of statutory duty and if so whether or not it gave rise to

any private law cause of action to plaintiffs. There were also submissions on the conspiracy, alleged by plaintiffs.

I would like if I may first set out the provisions of the Sabah Foundation Enactment, 1966 referred to me by Counsels, to which I think I need to direct my mind. These are, subject to correction, the preamble itself and ss 3, 4(1), (2)(a), (b), (c) and (d), 5(1)(a), (b), (c), 11(1), (2) and (3), and 12(1).

SABAH FOUNDATION ENACTMENT 1966
(No 8 of 1966)

An Enactment to provide for the establishment of a Sabah Foundation for the purposes of improving, and furthering the progress of, education and educational facilities in Sabah and encouraging and promoting a Malaysian consciousness therein and to assist and to promote a more equitable distribution of economic wealth amongst the peoples of Sabah and Malaysian citizens residing in Sabah and for giving aid to charitable institutions, for the establishment of a fund and the appointment of trustees for the carrying out of the purposes of the foundation, and for matters connected therewith and incidental thereto.

[10 May 1966]

WHEREAS in a speech made at Mesapol on the ninth day of November, 1965, Tun Datu Mustapha bin Datu Harun, SMN, PDK, OBE, made certain proposals for the setting up of a non-political, non-profit making Sabah Foundation for the promotion and provision of educational facilities for the youth of Sabah and the encouragement of a Malaysian consciousness among the peoples of Sabah;

AND WHEREAS it is desirable that the said Sabah foundation should be dully constituted and provision made for the execution of its functions so that the said proposals may be carried into effect:

NOW THEREFORE be it ENACTED by the Legislature of the State of Sabah as follows:

1. This Enactment may be cited as the Sabah Foundation Enactment, 1966.

xxxx xxxx xxxx

xxxx xxxx xxxx

Establishment and objects of the Foundation

3. There is hereby established the Sabah Foundation and the charitable objects for which the foundation is established are the advancement of education and the relief of poverty and other charitable purposes for the benefit of the peoples of Sabah and in particular (but if and so far only as the same are exclusively charitable) one or more of the following:

(a) actively to promote improvement of opportunity for education among all sections of the peoples of Sabah;

(b) to widen the scope for the peoples of Sabah in any approved institution of learning throughout the world, but especially in Malaysian Universities;

(c) to promote and encourage the provision in Sabah of facilities for higher learning;

(d) to grant, and arrange for the award by other bodies of, scholarships or other educational assistance for the peoples of Sabah or any Malaysian citizen in Sabah whenever it deems fit to do so;

(e) to establish and operate in all areas of Sabah (and especially in rural areas) schools, colleges, and (other centres for the purposes of providing the peoples of Sabah with both formal and informal education and training in vocational, technical and business skills and of encouraging among them the study of traditional music, arts and crafts with the aim of promoting self-reliance, racial harmony, tolerance and unity among the peoples of Sabah whilst preserving the individual cultures of such peoples;

(f) to assist and improve, whenever possible, the standard of living of poor Malaysian citizens residing in Sabah;

(g) voluntarily to give aid or assistance to the organisations and institutions which are organised and governed for scientific, medical, welfare, social educational or other purposes (provided always did any such purpose is charitable);

(h) to provide from its own resources on a voluntary basis ambulance service, a flying doctor service and other medical, welfare, social or educational services of a charitable nature;

(i) to contribute to the relief of national emergencies or calamities such as flood, fire, drought and other acts of God;

(j) to assist poor Malaysian citizen residing in Sabah by providing them with financial assistance whether in the form of cash payments or shares in investment trusts or otherwise, or material assistance whether in the form of accommodation, food, clothing or otherwise in every case in such manner and to such an extent as the board may from time to time determine.

Establishment of the Fund

4.(1) For the purpose of enabling the Foundation to carry out its objects, there shall be established a fund to be called the Sabah Foundation Fund.

(2) The Fund shall consist of:

(a) such sums as the Government may from time to time contribute to the fund;

(b) all other moneys which may be donated, contributed, loaned or in any other manner paid into the fund by any, authority or person;

(c) all interest received by the board upon such portion of the monies of the fund as may from time to time be invested or placed on deposit;

(d) all revenues from any property held by the board.

Establishment Boards of Trustees

5.(1) For the purpose of managing the foundation and administering and controlling the fund, there shall be established a board of trustees, to be called the Board of Trustees of the Sabah Foundation and which shall consist of:

(a) a chairman, who shall be the Chief Minister:

(b) two members appointed by the Federal Minister for the time being charged with responsibility for education;

(c) six members appointed by the Chief Minister.

Appointment, etc. of Director and Staff

11(1) The Board shall appoint a suitable person to be the director of the Foundation, and may from time to time appoint such other officers, clerks and servants as may be necessary for conducting the business of the Foundation.

(2) Any appointment made under the provisions of subsection (1) of this section shall be on such terms and conditions as the Board may deem fit.

(3) The director shall be the executive officer of the Foundation and shall exercise such powers and perform such duties and functions as the Board shall from time to time direct, and all other persons appointed under this section shall, subject to any general special directions of the board, exercise the powers and functions and perform the duties assigned to them by the director.

Application of Fund

12. (1) Subject to the provisions of subsection (3) of this section, the Board shall apply the capital and income of the fund whencesoever derived to the carrying out of the objects for which the foundation is established.

1. The Nature of the "Trust", Whether or not Justiciable at the Instance of Plaintiffs.

Perhaps I could start with the case now about 114 years old, *Alfred Kinloch v The Secretary of State for India in Council* [1882] Vol. VHL (E) 619, cited by Counsels for first and second defendants:

> An action having been brought against the secretary of State of India in Council by the appellant on behalf of himself and all other persons entitled under the royal grant to share in the booty, alleging a distribution of part and possession by the Secretary of State of the residue, and claiming an account and distribution of the residue –
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> Held, affirming the decision of the Court of Appeal, that the warrant did not transfer the property, or create a trust enforceable by the High Court of Justice; and that the Secretary of State being merely the agent of the Crown to distribute the fund the action could not be maintained.

And in *Tito v Waddell (No.2)* [I977] 1 Ch 106, also cited by Counsels for first and second defendants:

> Held, (1) that in *Ocean Island No.2* the use of the term "trust" in relation to the Crown did not necessarily create a true trust, enforceable by the Courts (a "trust in the lower sense") but might create a "trust in the higher sense", or governmental obligation, not enforceable in the Courts: that it was a question of construction whether in all the circumstances a true trust had been created, one material factor being whether the person required to hold on trust was described in his personal or in his official capacity; and that as there was nothing in the Ordinances or in the various instruments or other documents which sufficed to show that the Crown had undertaken any enforceable trust or fiduciary obligation such as was alleged, none had been created.
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> *Alfred Kinloch v Secretary of State for India in Council* [1882] 7 App Cas 619 H.L. (E) applied.

And with respect still with *Tito v Waddell (No.2)*, on the issue of the nature of a trust:

> That case, of course, concerned facts which were very different from the facts of the case before me. Yet it supports certain principles or considerations which are of relevance and importance. First, the use of a phrase such as "in trust for," even in a formal document such as a royal warrant, does not necessarily create a trust enforceable by the Courts. As Lord O'Hagan said, 7 App Cas 619, 630: "There is no magic in the word 'trust'." Second, the term "trust" is one which may properly be used to describe not only relationships which are enforceable by the Courts in their equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in this Division are described by Lord Selborne L.C. as being "trusts in the lower sense"; trusts of the latter kind, so unfamiliar in this Division, he called "trusts in the higher sense."

> I pause at that point. This classification of trusts seems to have made little impact upon the books: see, eg, *Lewin, Trusts, 16th Edn (1964), pp 10, 13; Underhill's Law of Trusts and Trustees, 12 Edn. (1970), p 51; Halsbury's Laws of England 3rd Edn, Vol 38 (1962), p 810*. There is, indeed, a certain awkwardness in describing as a trust a relationship which is not enforceable by the Courts, though the so-called trusts of imperfect obligation perhaps provide some sort of parallel. Certainly in common speech in legal circles "trust" is normally used to mean an equitable relationship enforceable in the Courts and not a governmental relationship which is not thus enforceable. I propose to use the word "trust" simpliciter (or for emphasis the phrase "true trust") to describe what in the conventional sense is a trust enforceable in the Courts, and to use Lord Selborne's compound phrase "trust in the higher sense "to express the governmental obligation that he describes.
>
> I return to the principles or considerations which the *Kinloch* case, *7 App Cas 619*, appears to support. The third is that it seems clear that the determination whether an instrument has created a true trust or a trust in the higher sense is a matter of construction, looking at the whole of the instrument in question, its nature and effect, and, I think, its context. Fourth, a material factor may be the form of the description given by the instrument to the person alleged to be the trustee. An impersonal description of him, in the form of a reference not to an individual but to the holder of a particular office for the time being may give some indication that what is intended is not a true trust, but a trust in the higher sense.

With respect, still with *Tito v Waddell (No.2)* on the issue whether a true trust or a governmental obligation,

> Quite apart from that, it seems to me that the surrounding circumstances, as well as the terms of the documents, do very little to support the concept of any true trust. Instead, they do much to support the view that, subject to the limited rights created by the annuity scheme, the Banaban Fund was a fund which was subject not to any true trust but to a trust "in the higher sense," or a governmental obligation, to use it for the general benefit of the Banaban community. It was money which the Banabans were told would be expended by the government in their interests, and no doubt this acted as an inducement to the Banabans to sign the 1913 agreement.
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> Difficult questions might have arisen if there had been statements by government officers before, during and after the 1913 transaction which showed an unequivocal intention that the 6d. additional royalty should be held on a true trust, enforceable in the Courts, and not merely under a governmental obligation, or trust in the higher sense. But in all the statements by the resident commissioner and others about trust funds and the like, I cannot see that there is anything that comes near to evidencing any such unequivocal intention. If there had been a well-known word in the English language which meant what

Lord Selborne L.C. in *Kinloch v Secretary of State for India in Council,* 7 App Cas 619 called a trust in the higher sence, then the fact that instead of that word the documents, formal and informal, used the word "trust" would have been much more significant. But there is no such word. "Trust" has to do duty for many things. Looking at matters as a whole, they seem to be explicable, and best explicable, on the footing of governmental obligation and not true trust.

And the commentary on *Alfred Kinloch* and on *Tito v Waddell (No.2)* in *Underhill and Hayton Law Relating to Trusts and Trustees,* 14th Edn, [I987], and in *Halsbury's Laws of England*, 4th Edn, Vol 48, para 514, p 258, (1995) are,

(1) **Underhill and Hayton**

Funds confined to State officials for distribution

The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State (who receive them from the Treasury) in favour of private persons.[1] And on similar grounds, where Queen Victoria, by royal warrant, granted booty of war to the Secretary of State to India, in trust, to distribute amongst the persons found entitled to share in it by the Court of Admiralty, it was held that the warrant did not operate as a declaration of trust in favour of such persons, but merely made the Secretary of State the agent of the Sovereign for the purpose of distributing the fund.[2] Similarly in *Tito v Waddell (No.2)*[3] the Crown was held to be merely under a governmental obligation to the Banabans in respect of the phosphate-rich Ocean Island so that no fiduciary obligations existed. The position is exhaustively analyzed by Megarry V-C.[4]

(2) **Halsbury's**

514. Distinction between governmental or public obligation and trust.

Ministers of the Crown often administer property for the benefit of others in the exercise of the Crown's governmental functions. No trust arises in such a case[1]. If a person carrying out a public statutory duty is in that duty, there is no remedy in breach of trust or equitable account[2]. There are, instead, the remedies of judicial review, declaration, injunction and recovery of money if wrongly demanded and paid[3].

As submitted by Counsels for first and second defendants Counsel for plaintiffs seems to rely somewhat heavily on *Fouche v State Superannuation Fund Board* [1952] 88 CLR 609, a judgment of the High Court of Australia, but with respect I agree with the submission by Counsels for first and second defendants,

8.2 The suit in that case was brought by Fouche. Fouche had borrowed some money from the Superannuation Fund Board, which was set up pursuant to the Superannuation Act 1938-1950 of Tasmania. Under the provisions of the agreement, certain payments were to be made by the Board to Fouche in implementation of the loan against architect's progress certificates. Certain

payments were made without reference to the progress certificates. As a result of publicity, the members of the old Board resigned. Fouche then sued the newly appointed, reconstituted Board to enforce payment by the Superannuation Fund to him in accordance with the loan arrangements.

8.3 The old Board counterclaimed against both Fouche and the members (or trustees) of the old Board. It was held that Fouche could not enforce the loan to him as the contract was in breach of trust and he was a party thereto.

8.4 The High Court said, *per curiam*:

> The contributors to the Superannuation Fund have an interest in the fund which would probably give them standing in a Court of equity, **but they have not such a beneficial interest in the trust fund as an ordinary** *cestui que* ***trust***. The trust is **not** a trust for persons but a trust for statutory purposes.

8.5 Firstly, the case is distinguishable because on the facts of that case, the Superannuation Fund was a contributor-based fund. In other words, members of the public who were contributors contributed to the fund. Their money was going into the fund as contributions. In the case of the Sabah Foundation, there is no such contribution by any Malaysian citizen born and residing in Sabah.

8.6 Secondly, the High Court clearly said that the contributors do not have **such a beneficial interest** as an ordinary *cestui que* ***trust***. Therefore the decision **does not help** the Plaintiffs in the present case.

8.7 Thirdly, in the *Fouche* case, it was the new Board that sued the former trustees. This is consistent with the 1st and 2nd defendants' submission based on s. 14 of the Sabah Foundation Enactment did the present trustees and Board of the Sabah Foundation could and should sue and not the three individual plaintiffs.

8.8 Fourth, the High Court of Australia did not consider the decision of the House of Lords in *Alfred Kinloch v Secretary of State for India*. However, the High Court still found that the Superannuation Act 1938-1950 created a statutory trust, and not a private trust. Therefore, the Plaintiffs in the case of the Sabah Foundation cannot derive assistance from this case.

As submitted by Counsels for first and second defendants Counsel for plaintiffs seems also to rely somewhat heavily on *Board of Trustees of the Sabah Foundation v Datuk Haji Kassim Othman ("The Writ'), SLA. Vol IX* [1990-1991], and here again with respect I agree with the submission by Counsels for first and second defendants,

1.2 The actual decision in the case concerned the validity of a Trust Deed dated 18th January 1971 whereby Tun Datu Haji Mustapha bin Datu Harun and Datuk Syed Kechik bin Syed Mohamed were made trustees of the income from a certain timber concession.

1.3 In the course of the judgment, Tan Chiaw Thong, J stated that the Board of the Sabah Foundation are "... trustees of a trust established under statute ..." (at p 87 of the plaintiffs' list of authorities).

1.4 It is respectfully submitted that –

(a) insofar as this decision suggests that the words used by the Honourable Judge, namely "*... trustees of a trust established by statute ...* "(at page 87 of the plaintiffs' list of authorities), then the case is consistent with the concept of statutory trust which the 1st and 2nd defendants' have submitted on earlier, namely; that there is a trust-like governmental obligation within the meaning of *Tito v Waddell* which has been conferred by Parliament but which **does not** have the characteristics of a private trust enforced in equity.

(b) however, insofar as the words suggest that the Sabah Foundation is a private trust having the characteristics of a private trust of the sort regularly administered under the equitable jurisdiction of Court, then the said finding is –

(i) an *obiter dictum* as it was strictly unnecessary for the eventual decision of the Court;

(ii) *per incuriam* as it was made without the benefit of citation of authorities such as the *Alfred Kinloch v. Secretary of State for India* and *Tito v. Waddell*

(iii) In any event, it is distinguishable as the Plaintiffs in that case were the Board of Trustees themselves, and were, therefore, the proper plaintiffs.

1.5 The decision does not at all go anywhere near establishing that ordinary citizens of Sabah are "beneficiaries" so as to be clothed with *locus standi* for purposes of suing in respect of alleged wrongs committed by members of the Board of Trustees.

Also relied by Counsel for plaintiffs is *Jacob's Law of Trust in Australia*, 5th Edn, [1986] para 274, p 54, under "Trusts for statutory purpose", a passage, a commentary on *Fouche and on Superannuation Fund Investment Trust v. Commissioner of Stamps (SA)* [1979] 145 CLR 330, also a judgment of the High Court of Australia, a commentary which did say "To compound the complexity, their Honours added that ..." and ended with respect I think reiterating the law,

> These decisions illustrate that the Legislature may by statute create entities which have some but not all of the characteristics of a trust and that in each case the true construction of the statute will determine how close in the analogy to a trust; the mere use of the term "trust" to describe the entity created by the statute will not of itself be sufficient to endow it with the character of a private of public trust with all the incidents of that status under the general law.

With respect. I do not think *Fouche* or *Superannuation Fund Investment Trust* either singly or jointly is of any help to plaintiffs.

With respect, in the present suit now before me, I now direct my mind to the provisions of the Enactment referred to me by Counsels and the Enactment as a whole, "looking at the whole of the instrument in question; its nature and effect and I think its context", "the surrounding circumstances, as well as the terms of the documents" to determine the nature of the "Trust", whether or not justiciable at the instance of the plaintiffs.

The preamble sets out the purpose of the Foundation, the "Trust" which plaintiffs concede "a trust created for statutory purpose ('the Trust')", para 3(e) of amended statement of claim, in specific and in general terms, for the purpose of improving the peoples of Sabah and Malaysian citizens residing in Sabah and the youth of Sabah and for this purpose the "Trust" is established (s 3), for the purpose of enabling the "Trust" to carry out its objects the Fund is established (s 4), for the purpose of managing the "Trust" and administering and controlling the Fund and Board of Trustees is established [s 5(1)], for the purpose of conducting the business of the "Trust" a Director is appointed by the Board of Trustees [s 11(1)], and the application of the Fund for the carrying out of the objects for which the "Trust" is established [s 12(1)].

With respect, it is clear,

(1) from the preamble itself that the "Trust" is not restricted to any limited class of the public but to the general benefit of the public at large who are Malaysian citizens residing in Sabah, and for the citizens of Sabah, as a whole.

(2) from s 3 more particularly s 3(j) with "in such manner and to such an extent as the Board may from time to time determine" is indicative of "Governmental obligation, duties or functions belonging to the prerogative and the authority of the Crown", [*Tito v Waddell* (No.2)].

(3) from s. 4 as submitted by Counsels for first and second defendants a "non-contributor based Fund," by Malaysians, by plaintiffs.

(4) from ss 5(1), 11(1), "the description given by the instrument to the person alleged to be the trustee. An impersonal description of him, in the form of reference not to an individual but to the holder of a particular office for the time being, may given some indication that what is intended is not a true trust, but a trust in the higher sense." [*Tito v Waddell* (No. 2)], here in the present suit now before me, it is significant that the Chairman, Board of Trustees, is not an individual but the holder of a particular office, the office of Chief Minister of Sabah and as for the members no reference to any individual.

As in *Tito v Waddell* (No. 2),

> Quite apart from that, it seems to me that the surrounding circumstances, as well as the terms of the documents, do very little to support the concept of any true trust. Instead they do much to support the view that, subject to the limited rights created by the annuity scheme, the Banaban Fund was a fund which was subject not to any true trust but to a trust "in the higher sence," or a governmental obligation, to use it for the general benefit of the Banaban community. It was money which the Banabans were told would be expended by the government in their interests; and no doubt this acted as an inducement to the Bambans to sign the 1913 agreement.

With respect, in the present suit now before me too, from the surrounding circumstances, looking at the whole of the relevant provisions, a question of construction, the terms of the relevant provisions, the instrument "Trust " is a governmental obligation not restricted to any limited class of the public but for the general benefit of the public at large who are Malaysian citizens residing in Sabah, and for the citizens of Sabah, as a whole just as the Banaban Fund was a governmental obligation for the general benefit of the Banaban community, *Tito v Waddell* (No. 2).

With respect, I therefore find that in the present suit now before me the nature of the "Trust" is such that it is not a true trust but it is a "trust in the higher sense" not justiciable at the instance of plaintiffs.

Whether or Not First and Second Defendants Have Committed a Breach of Statutory Duty and if so Whether or not it Gave Rise to any Private Law Cause of Action to Plaintiffs.

As with the first issue here too I would like to refer to a few authorities for my guidance.

In *X (Minors) v Bedfordshire C.C* [1995] 2 AC 633 at 636, 730, 731, 740, 741, cited by Counsels for first and second defendants:

> ***Held,*** (1) that a breach of statutory duty did not by itself give rise to any private law cause of action, but such a right might arise, where, on its true construction, the statute imposed a duty for the protection of a limited class of the public and there was a clear parliamentary intention to confer a private right of action for breach on members of that class, that there was no general rule for ascertaining whether a statute conferred such a right of actions but the absence of another remedy for breach and a clear intention to, protect the limited class were indications that a private right of action existed, and the, mere existence of some other remedy was not necessarily decisive that no private right existed; and that a plaintiff basing his claim on a careless exercise of a statutory duty had to show the existence of circumstances giving rise to a duty of care at common law.
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General approach
Introductory - public law and private law

The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The distinction is important because a number of earlier cases (particularly in the field of education) were concerned with the enforcement by declaration and injunction of what would now be called public law duties. They were relied on in argument as authorities supporting the plaintiffs' claim for damages in this case. I will consider them in a little more detail later.

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(A) Breach of statutory duty simpliciter

This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty causing (c) damage to the plaintiff The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.

The principles applicable in determine whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not by itself give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does, create such a right of action but there are a number of indicators. If this statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cuttler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173.

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Striking Out

In all these cases the defendants are seeking to strike out the claims at an early stage, before discovery has taken place and before the facts are known. It is therefore necessary to proceed on the basis that the facts alleged in the various statements of claim are true. It must be stressed that these allegations are not admitted by the defendants.

Actions can only be struck out under RSC, O 18, r 19 where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts. But I agree with Sir Thomas Bingham M.R. *ante*, p 694B-D that there is nothing inappropriate in deciding on these applications whether the statutes in question confer private law rights of action for damages: the answer to that question depends upon the construction of the statutes alone.

In *M (A Minor) v Newham LBC* [1995] 2 AC 633 at 671, also cited by Counsels for first and second defendants:

The subject matter of a statute may by itself be of a nature such as to render the existence of a private remedy unlikely. Thus in *E (A Minor) v Dorset County Council*, 7 April 1993, *C V Hampshire Country Council (unreported)*, 7 April 1993, Otton J struck out private claims in respect of the statement process in the Education Act 1981. Both plaintiffs had alleged negligence, and E also relied on breach of statutory duty. The judge reviewed the authorities on statutory duty on some length. He said:

> Generally the Courts are reluctant to allow an action in tort against public authority where the duty in question is a general statutory responsibility for the public welfare. Hence no action lies against the Minister of Education for breach of his duty 'to promote the education of the people of England and Wales.'

Referring to *X (Minors) v Bedfordshire CC* and *M (A Minor) v Newham LBC*, the two cases above and other related appeals the submission by Counsels for first and second defendants with which, with respect, I agree:

> 32. In *X (Minors) v Bedfordshire County Council & Related Appeals* [1995] 2 AC 633, the House of Lords had to consider the issue of whether various local authorities had breached various statutory duties under various pieces of legislation. In dealing with the elements of an action for breach of statutory duty, Lord Browne-Wilkinson, who delivered the main speech, said that the action had the following elements (1995) 2 AC 633 at 731 C –
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> (1) a statutory duty;
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> (2) a breach of that duty;
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> (3) causing damage to the plaintiff.

33. Lord Browne-Wilkinson said that neither proof of any breach of the plaintiffs' common law rights nor proof of any carelessness by the defendant was necessary – [1995] 2 AC 633 at 731 C.

34. Lord Browne-Wilkinson summarized the approach of the Court as follows –

(a) the basic proposition is that in the ordinary case, breach of statutory duty does not, by itself, give rise to any private law cause of action;

(b) however, the private law cause of action will arise if it can be shown that as a matter of construction of the statute**,** the statutory duty was imposed by Parliament for the protection of a limited class of the public and Parliament intended to confer on members of that class a private right of action for breach of that duty.

35. As for determining whether a private law right of action could be found to exist, Lord Browne-Wilkinson said [1995] 2 AC 633 at 731E –

(a) there is no general rule but there are a number of indicators;

(b) if the statute provides no other remedy for breach, and the intention to protect a limited class is shown, then this means that a right of action was conferred as otherwise there would be no means of enforcing the duty;

(c) if the statute does provide some other means of enforcing the duty, then this may indicate that the statutory rights were to be enforced by those means and not by a private action;

(d) be that as it may, the mere, existence of another statutory remedy is not decisive of the matter.

36. In connection with the nature of the legislation that was before the Court, Lord Browne-Wilkinson also said [1995] 2 AC 633 at 731 H –

> ... it is significant that Your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty.

37. Applying this *dictum* to the facts of our case, the Enactment of 1966 was clearly enacted for the benefit of the public at large in the State of Sabah. The creation of the Foundation and the provision of the Fund can be likened to a species of social welfare legislation.

38. Therefore, as a matter of statutory construction, it is clear that the Sabah Legislature did not intend the protection to be for a "limited class of the public", but rather for the citizens of Sabah as a whole. [Reference should be made to the various parts of the Enactment at this stage].

39. This alone should dispose of the issue as to whether the plaintiffs were intended by the Sabah to have a cause of action.

40. Reverting to the other guidelines mentioned by Lord Browne-Wilkinson, the following sections of the Enactment may be mentioned:

(a) section 6(2), which provides that the Board may sue and be sued in the name of the Board of Trustees of the Sabah Foundation.

(b) section 14, which provides for exclusion of liability of Board members otherwise than for negligence, fraud or dishonesty.

41. These provisions indicate that the Enactment contemplates a right of action. But they also beg the question as to who is competent to sue? It is submitted that only:

a) the State Attorney-General may sue to enforce duties and obligations and to recover defalcations or loss to the Fund, as these are moneys of a State or public character.

(b) the other, non-culpable Board members may sue the culpable irresponsible Board members if there has been fraud, negligence or dishonesty.

42. Reverting next to the elements of the cause of action, the third element is damage to the plaintiffs. It is submitted as follows –

(i) the plaintiffs in their individual capacities have no beneficial interest in the *corpus* of the Fund. This fact must follow if Your Lordship holds that the Enactment does not create a true trust.

(ii) any benefit to be obtained from the Foundation and the Fund is not a matter of right but an expectation or *spes*. The same can be said of the Amanah. Any dividend for example, is not a matter of right but of expectation:

(iii) the plaintiffs are not shareholders of Sapangar Sdn Bhd or of Sabah Berhad Sdn Bhd.

(iv) the Foundation is a separate legal entity – see s 6(1) of the Enactment. Therefore, ownership of the Fund is in the hands of the Foundation. It is the proper plaintiff.

43. Bearing in mind all of the above, it is respectively submitted that the Plaintiffs have no claim for breach of statutory duty.

Again in *Swain v Law Society* [1983] 1 AC 598, Lord Brightman said:

> The claim of the respondent is that The Law Society is legally obliged to account to all solicitor-insurers – the premium payers – for all money received by the Law Society from the brokers under the 1976 agreement and to hand over to each such solicitor a due proportion of such money, calculated no doubt *pro rata* according to the premium paid by the solicitor-insurer.

My Lords, the insurance scheme is statutory. It flows from s 37 and the rules made thereunder, of which the form of master policy and the form of insurance certificate are an integral part. **In exercising its power under s 37, the Law Society is performing a public duty, a duty which is designed to benefit not only solicitor-principals and their staff, but also solicitors' clients.** The scheme is not only for the protection of the premium paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and the mistakes of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the principal purpose of s 37 was to confer on the Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves. This is underlined by the position of s. 37, which is one of a group of three sections, the other two of which are plainly enacted in the interests of the lay public. So, there is no doubt at all in my mind that the power given to the Law Society by s 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly, in the interests of those members of the public who resort to solicitors for legal advice. So, as I have said, in exercising the power conferred on it. **The Law Society was performing a public duty, and not a private duty to premium-paying solicitors. This approach, which in my opinion is fundamental has important consequences, because the nature of public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached. If a public duty is breached there is the remedy of judicial review. There is no remedy in breach of trust or equitable account. The latter remedies are available, and available only, when a private trust has been created –see the decision of Your Lordships' House in** *The Skinners' Co v The Irish Society* [1845] 12 CL & F 425. **The duty imposed on the possessor of a statutory power for public purposes is not accurately described fiduciary because there is no beneficiary in the equitable sense.**

With respect in the present suit now before me in short 'a "trust in the higher sense", not for the protection of a limited class of the public, the "Trust" performing a public duty and not a private duty and thus not conferring on members of any limited class of the public a private right of action for breach of the duty, not enforceable by private right of action and even upon a breach does not give rise to any private law cause of action to plaintiffs.

III. Locus Standi

In *Swain v Law Society*, "the duty imposed on the possessor of a statutory power for public purposes" with respects as with the "Trust" in the present suit now before me, "is not accurately described as fiduciary because there is no beneficiary in the equitable sense." Plaintiffs in the present suit now before me are not beneficiaries under the "Trust".

Also in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 SC:

> The following questions, *inter alia*, arose on the appeal –
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> xxxx xxxx xxxx
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> (c) whether he has l*ocus standi*, ie title to bring and maintain the action against the Government.
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> Held, by a majority (Salleh Abas LP, Abdul Hamid CJ (Malaya) and Hashim Yeop A. Sani SCJ) allowing the appeals (Seah and Abdoolcader SCJJ. dissenting):
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> [Per Salleh Abas LP]:
>
> (1) the respondent's statement of claim does not disclose any cause of action at all in order to enable him to maintain the suit against UEM. He has no legal relationship with UEM, he is a complete stranger to the company and he is not a shareholder. Nor has he any interest directly or indirectly in the running of the affairs of the company nor has the company done any wrong to the respondent or deprived him of his right and privilege. The respondent's suit against UEM is therefore ummaintainable and its application to strike it out should therefore be granted and consequently its appeal allowed.

In the present suit now before me too plaintiffs have "no legal relationship" with the "Trust", "is a complete stranger" to the "Trust", "nnot a shareholder," "no interest directly or indirectly in the running of the affairs" of the "Trust" done any wrong to plaintiffs or deprived plaintiffs or plaintiffs' rights/privileges,

And with respect particularly with my ruling against plaintiffs on the issues I and II above, plaintiffs have no *locus standi* and plaintiffs have no title to bring and maintain the suit against defendants.

IV Conspiracy

With respect, I agree with the submission by Counsels for first and second defendants,

> 6.3 Conspiracy to injure is a species of tort. One of the elements of a cause of action in conspiracy is the need for the plaintiff to show an intent to injure the plaintiff: see *Lonrho plc v Fayed & Ors* [1992] 1 AC 448. It need not be the predominant motive but there has to be an intention to injure.
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> 6.4 If paragraph 20 of the amended statement of claim is looked at carefully, it is clear that there is no averment whatsoever that there was an intention to injure the plaintiffs.

6.5 None of the particulars of the alleged conspiracy given in paragraph 21 of the amended statement of claim disclose any intention to injure the three specific plaintiffs.

6.6 The plaintiffs assert in paragraph 21 that the Trust (and its subsidiary companies) were injured, and that therefore the plaintiffs as persons having an interest in the Trust, also suffered loss and damage.

6.7 This begs the question as to whether the plaintiffs did suffer loss and damage. The answer is no because plaintiffs are not beneficiaries. This involves the same legal basis that has been subject of the argument on the trust point and therefore need not be repeated.

6.8 But this is a different matter from satisfying the essential element of the tort of conspiracy, namely, intent to injure. Here the Plaintiffs have clearly failed.

Conclusion

My brother Judge YA Ian Chin has made available to me *"The Times: Law Report., May 6, 1996 Chancery Division"* which was on the Internet a few days ago,

The Times: Law Report: May 6 1996
Chancery Division

Private person cannot enforce undertaking.

Mid-Kent Holdings Plc v General Utilities PIc.

Before Mr Justice Knox.

[Judgment April 30]

A private person had no right of action under the Fair Trading Act 1973 or under the general law to bring proceedings to enforce undertakings given to the Secretary of State following a report by the Monopolies and Mergers Commission which concluded that a 'merger situation was likely to operate against an identified public interest.

It was not sufficient for a private person to show that damage had been caused to him by a breach of a statutory public duty. It had also to be shown that the relevant enactment was intended by Parliament to provide a civil remedy for the apprehended wrong to the person concerned.

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Section 93A of the 1973 Act, inserted by section 148 of the Companies Act 1989, and which dealt with the enforcement of undertakings did not confer a wider right on any person to enforce an undertaking.

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His Lordship said that it would been extraordinary for Parliament to confer a remedy for breach of an undertaking on a far wider basis than for the breach of an order.

It could hardly have been Parliament's intention that the whole population of the country should be entitled to bring civil -proceedings for failure to fulfill an undertaking. Therefore the availability of a remedy by way of civil proceedings depended on the general law rather than on the Act.

His Lordship considered, *inter alia, Cuttler v Wandsworth Stadium Ltd I [1949] AC 398; Lonrho Ltd v Shell Petroleum Co Ltd. (No. 2) [1982] AC 173; Gouriet v Union of Post Office Workers [1978] AC 435; Pickering v Liverpool Daily Post and Ecko Newspaper plc [1991] 2 AC 370* and *R v Deputy Governor of Parkhurst Prison Others, ex parte Haque [1992] 1 AC 58* and concluded that they seemed to establish the following principles.

First, it was not enough for a plaintiff to show a breach of statutory public duty and damage thereby caused to the plaintiff, whether the claim was for damages, injunction or a declaration.

Second, it was always necessary where a private claim was brought in respect of a breach of statutory public duty to investigate how far the statutory provisions in question were intended to cover a private right of action.

Third, where a procedural remedy was provided by the statute, whether by way of criminal sanction or other particular procedure such as a civil action only to be brought by a minister or other public officer, that constituted an indication that it was that procedural remedy alone that was intended by Parliament to be available as a sanction.

The two exceptions to the third principle were:

1. Where the statutory provisions were enacted in order to provide protection for a class of persons, such as mineworkers or factory workers, and the breach of duty in question was one which would be likely to cause a member of the class intended to be protected economic loss or injury to either property or person, and

2. Where a public right was created by statute to be enjoyed generally by persons wishing to avail themselves of it, and damage peculiar to the plaintiff was suffered as a result of interference with that public right. A statutory prohibition of otherwise lawful conduct could not amount to the creation of such a public right.

With respect in the present suit now before me the "Trust" was not to provide protection or improvement for a class of persons such as mine workers or factory workers, nor was any "damage peculiar to the plaintiff" suffered by plaintiffs, *Mid Kent Holdings Plc v General Utilities Plc.*

Futhermore it could hardly have been that the Sabah State Legislature's intention that the whole population of Malaysian citizens residing in Sabah should be entitled to bring civil proceedings in respect of the "Trust".

Reported by Isaac TJ Lee